Minutes of Spring 2003 Meeting of
Advisory Committee on Appellate Rules
May 15, 2003
Washington, D.C.

I. Introductions

Judge Samuel A. Alito, Jr., called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, May 15, 2003, at 8:30 a.m. at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. The following Advisory Committee members were present: Judge Diana Gribbon Motz, Judge Carl E. Stewart, Judge Stanwood R. Duval, Jr., Justice Richard C. Howe, Prof. Carol Ann Mooney, Mr. W. Thomas McGough, Jr., Mr. Sanford Svetcov, and Mr. John G. Roberts, Jr. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, was present representing the Solicitor General. Also present were Ms. Marcia M. Waldron, the liaison from the appellate clerks; Mr. John K. Rabiej from the Administrative Office; and Ms. Marie C. Leary from the Federal Judicial Center.

Judge Alito announced that the terms of Judge Motz and Prof. Mooney would expire before the next meeting of the Committee. Judge Alito thanked Judge Motz and Prof. Mooney for their devoted service to the Committee — in Judge Motz's case, as a member, and in Prof. Mooney's case, first as the Reporter and then as a member.

Judge Alito also announced that the nomination of Mr. Roberts to the U.S. Court of Appeals for the D.C. Circuit had been approved by the Senate on May 8. On behalf of the entire Committee, Judge Alito congratulated Mr. Roberts on his confirmation.

II. Approval of Minutes of November 2002 Meeting

The minutes of the November 2002 meeting were approved.

III. Report on January 2003 Meeting of Standing Committee

The Reporter stated that, at the January 2003 meeting of the Standing Committee, Judge Alito gave an update on the continuing deliberations of the Advisory Committee with respect to the proposed amendment to Rule 35(a) regarding en banc voting and the proposed new Rule 32.1 regarding the citation of "unpublished" opinions. The Reporter said that members of the Standing Committee had expressed a great deal of interest in these two proposals.

IV. Action Items

A. Item No. 00-08 (FRAP 4(a)(6) — clarify whether verbal communication provides "notice")

The Reporter introduced the following proposed amendment and Committee Note:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

* * * * *

(6) **Reopening the Time to File an Appeal.** The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives or observes written notice of the entry from any source, whichever is earlier;

~~(B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry;~~ and

(C) the court finds that no party would be prejudiced.

* * * * *

Committee Note

Rule 4(a)(6) has permitted a district court to reopen the time to appeal a judgment or order upon finding that four conditions were satisfied. First, the district court had to find that the appellant did not receive notice of the entry of the judgment or order from the district court or any party within 21 days after the judgment or order was entered. Second, the district court had to find that the appellant moved to reopen the time to appeal within 7 days after the appellant received notice of the entry of the judgment or order. Third, the district court had to find that the appellant moved to reopen the time to appeal within 180 days after the judgment or order was entered. Finally, the district court had to find that no party would be prejudiced by the reopening of the time to appeal.

Rule 4(a)(6) has been amended to specify more clearly what kind of "notice" of the entry of a judgment or order precludes a party from later moving to reopen the time to appeal. In addition, Rule 4(a)(6) has been amended to address confusion about what kind of "notice" triggers the 7-day period to bring a motion to reopen. Finally, Rule 4(a)(6) has been reorganized to set forth more logically the conditions that must be met before a district court may reopen the time to appeal.

Subdivision (a)(6)(A). Former subdivision (a)(6)(B) has been redesignated as subdivision (a)(6)(A), and one important substantive change has been made.

Prior to 1998, former subdivision (a)(6)(B) permitted a district court to reopen the time to appeal if it found "that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry." The rule was clear that the "notice" to which it referred was the notice required under Civil Rule 77(d), which must be served by the clerk pursuant to Civil Rule 5(b) and may also be served by a party pursuant to that same rule. In other words, prior to 1998, former subdivision (a)(6)(B) was clear that, if a party did not receive formal notice of the entry of a judgment or order under Civil Rule 77(d), that party could later move to reopen the time to appeal (assuming that the other requirements of subdivision (a)(6) were met).

In 1998, former subdivision (a)(6)(B) was amended to change the description of the type of notice that would preclude a party from moving to reopen the time to appeal. As a result of the amendment, former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive "*such* notice" — that is, the notice required by Civil Rule 77(d) — but instead referred to the failure of the moving party to receive "*the* notice." And former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive notice from "the *clerk* or any party," both of whom are explicitly mentioned in Civil

Rule 77(d). Rather, former subdivision (a)(6)(B) referred to the failure of the moving party to receive notice from "the *district court* or any party."

The 1998 amendment meant, then, that the type of notice that precluded a party from moving to reopen the time to appeal was no longer limited to Civil Rule 77(d) notice. Under the 1998 amendment, *some* kind of notice, in addition to Civil Rule 77(d) notice, precluded a party. But the text of the amended rule did not make clear what kind of notice qualified. This was an invitation for litigation, confusion, and possible circuit splits.

To avoid such problems, former subdivision (a)(6)(B) — new subdivision (a)(6)(A) — has been amended to restore its pre-1998 simplicity. Under new subdivision (a)(6)(A), if the court finds that the moving party was not notified under Civil Rule 77(d) of the entry of the judgment or order that the party seeks to appeal within 21 days after that judgment or order was entered, then the court is authorized to reopen the time to appeal (if all of the other requirements of subdivision (a)(6) are met). Because Civil Rule 77(d) requires that notice of the entry of a judgment or order be formally served under Civil Rule 5(b), any notice that is not so served will not operate to preclude the reopening of the time to appeal under new subdivision (a)(6)(A).

REVISED VERSION OF NOTE TO AMENDMENT TO RULE 4(a)(6)(B)

Subdivision (a)(6)(B). Former subdivision (a)(6)(A) has been redesignated as subdivision (a)(6)(B), and one important substantive change has been made.

New subdivision (a)(6)(B) makes clear that only *written* notice of the entry of a judgment or order will trigger the 7-day period for a party to move to reopen the time to appeal that judgment or order. However, all that is required is that a party receive or observe written notice of the entry of the judgment or order, not that a party receive or observe a copy of the judgment or order itself. Moreover, nothing in new subdivision (a)(6)(B) requires that the written notice be received from any particular source, and nothing requires that the written notice be served pursuant to Civil Rules 77(d) or 5(b). "Any written notice of entry received by the potential appellant or his counsel (or conceivably by some other person), regardless of how or by whom sent, is sufficient to open [new] subpart [(B)'s] seven-day window." *Wilkens v. Johnson*, 238 F.3d 328, 332 (5th Cir.) (footnotes omitted), *cert. denied*, 533 U.S. 956 (2001). Thus, a person who checks the civil docket of a district court action and learns that a judgment or order has been entered has observed written notice of that entry. And a person who learns of the entry of a judgment or order by fax, by e-mail, or by viewing a website has also received or observed written notice. However, an oral communication is not written notice for purposes of new subdivision (a)(6)(B), no matter how specific, reliable, or unequivocal.

Courts had difficulty agreeing upon what type of "notice" was sufficient to trigger the 7-day period to move to reopen the time to appeal under former subdivision (a)(6)(A). The majority of circuits held that only written notice was sufficient, although nothing in the text of the rule suggested such a limitation. *See, e.g., Bass v. United States Dep't of Agric.*, 211 F.3d 959, 963 (5th Cir. 2000). By contrast, the Ninth Circuit held that while former subdivision (a)(6)(A) did not require written notice, "the quality of the communication [had to] rise to the functional equivalent of written notice." *Nguyen v. Southwest Leasing & Rental, Inc.*, 282 F.3d 1061, 1066 (9th Cir. 2002). It appeared that oral communications could be deemed "the functional equivalent of written notice" if they were sufficiently "specific, reliable, and unequivocal." *Id.* Other circuits suggested in dicta that former subdivision (a)(6)(A) required only "actual notice," which, presumably, could have included oral notice that was not "the functional equivalent of written notice." *See, e.g., Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir. 2000). And still other circuits read into former subdivision (a)(6)(A) restrictions that appeared only in former subdivision (a)(6)(B) (such as the requirement that notice be received "from the district court or any party," *see Benavides v. Bureau of Prisons*, 79 F.3d 1211, 1214 (D.C. Cir. 1996)) or that appeared in neither former subdivision (a)(6)(A) nor former subdivision (a)(6)(B) (such as the requirement that notice be served in the manner prescribed by Civil Rule 5, *see Ryan v. First Unum Life Ins. Co.*, 174 F.3d 302, 305 (2d Cir. 1999)).

New subdivision (a)(6)(B) resolves this circuit split by making clear that only *written* notice of the entry of a judgment or order will trigger the 7-day period for a party to move to reopen the time to appeal. "[R]equir[ing] written notice will simplify future proceedings. As the familiar request to 'put it in writing' suggests, writings are more readily susceptible to proof than oral communications. In particular, the receipt of written notice (or its absence) should be more easily demonstrable than attempting to discern whether (and, if so, when) a party received actual notice." *Scott-Harris v. City of Fall River*, 134 F.3d 427, 434 (1st Cir. 1997), *rev'd on other grounds sub nom. Bogan v. Scott-Harris*, 523 U.S. 44 (1998).

ORIGINAL VERSION OF NOTE TO AMENDMENT TO RULE 4(a)(6)(B)

Subdivision (a)(6)(B). Former subdivision (a)(6)(A) has been redesignated as subdivision (a)(6)(B), and one important substantive change has been made.

Former subdivision (a)(6)(A) required a party to move to reopen the time to appeal "within 7 days after the moving party receives notice of the entry [of the judgment or order sought to be appealed]." Courts had difficulty agreeing upon what type of "notice" was sufficient to trigger the 7-day period. The majority of

circuits that addressed the question held that only *written* notice was sufficient, although nothing in the text of the rule suggested such a limitation. *See, e.g., Bass v. United States Dep't of Agric.*, 211 F.3d 959, 963 (5th Cir. 2000). By contrast, the Ninth Circuit held that while former subdivision (a)(6)(A) did not require written notice, "the quality of the communication [had to] rise to the functional equivalent of written notice." *Nguyen v. Southwest Leasing & Rental, Inc.*, 282 F.3d 1061, 1066 (9th Cir. 2002). It appeared that oral communications could be deemed "the functional equivalent of written notice" if they were sufficiently "specific, reliable, and unequivocal." *Id.* Other circuits suggested in dicta that former subdivision (a)(6)(A) required only "actual notice," which, presumably, could have included oral notice that was not "the functional equivalent of written notice." *See, e.g., Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir. 2000). And still other circuits read into former subdivision (a)(6)(A) restrictions that appeared only in former subdivision (a)(6)(B) (such as the requirement that notice be received "from the district court or any party," *see Benavides v. Bureau of Prisons*, 79 F.3d 1211, 1214 (D.C. Cir. 1996)) or that appeared in neither former subdivision (a)(6)(A) nor former subdivision (a)(6)(B) (such as the requirement that notice be served in the manner prescribed by Civil Rule 5, *see Ryan v. First Unum Life Ins. Co.*, 174 F.3d 302, 305 (2d Cir. 1999)).

Former subdivision (a)(6)(A) — new subdivision (a)(6)(B) — has been amended to resolve this circuit split. Under new subdivision (a)(6)(B), only *written* notice of the entry of a judgment or order triggers the 7-day period. "[R]equir[ing] written notice will simplify future proceedings. As the familiar request to 'put it in writing' suggests, writings are more readily susceptible to proof than oral communications. In particular, the receipt of written notice (or its absence) should be more easily demonstrable than attempting to discern whether (and, if so, when) a party received actual notice." *Scott-Harris v. City of Fall River*, 134 F.3d 427, 434 (1st Cir. 1997), *rev'd on other grounds sub nom. Bogan v. Scott-Harris*, 523 U.S. 44 (1998).

All that is required to trigger the 7-day period under new subdivision (a)(6)(B) is that a party receive or observe written notice of the entry of a judgment or order, not a copy of the judgment or order itself. Moreover, nothing in new subdivision (a)(6)(B) requires that the written notice be received from any particular source, and nothing requires that the written notice be served pursuant to Civil Rules 77(d) or 5(b). "Any written notice of entry received by the potential appellant or his counsel (or conceivably by some other person), regardless of how or by whom sent, is sufficient to open [new] subpart [(B)'s] seven-day window." *Wilkens v. Johnson*, 238 F.3d 328, 332 (5th Cir.) (footnotes omitted), *cert. denied*, 533 U.S. 956 (2001). Thus, a person who checks the civil docket of a district court action and learns that a judgment or order has been entered has observed written notice of that entry. And a person who learns of the entry of a judgment or order by fax, by e-mail, or by viewing a website has also received or observed written notice. However, an oral communication is not

written notice for purposes of new subdivision (a)(6)(B), no matter how specific, reliable, or unequivocal.

The Reporter said that this was the third time that the Committee had considered a draft amendment to Rule 4(a)(6). Prior drafts were discussed at the April 2002 and November 2002 meetings.

Describing the most recent draft amendment, the Reporter said that the amendment to subdivision (A) and the accompanying Committee Note were identical to the amendment and Note approved by the Committee at its November 2002 meeting.

Regarding the amendment to subdivision (B), the Reporter said that the amendment had been changed precisely as the Committee had directed at its November 2002 meeting. Specifically, the words "or observes" were inserted after "receives" and before "written," and the words "from any source" were added after "entry" and before "whichever." These changes are intended to communicate more clearly that the 7-day period is triggered even when a party has not been served with notice of the entry of the judgment, but instead has learned of that entry "passively" by, for example, checking a docket sheet or a website.

Regarding the Note, the Reporter reminded the Committee that, at the November 2002 meeting, a member of the Committee suggested reordering the Note to the amendment to subdivision (B) so that it first described the changes made by the amendment and then described the reasons for the changes. The Reporter said that he had revised the Note as requested. However, the Reporter thought that, although both the original Note and the revised Note were satisfactory, the original Note was clearer on first read. The Reporter provided both versions of the Note so that the Committee could decide which it preferred.

After a brief discussion, the Committee decided by consensus to make two changes to the revised version of the Note. First, the Committee deleted the quotation from *Scott-Harris v. City of Fall River*. By referring to "written" notice, to "'put[ting] it in writing,'" and to "writings," that quotation might mislead readers about the scope of amended subdivision (B). Again, the 7-day window is triggered not just by notice received from "writings," but by, for example, notice observed on a website. Second, the Committee inserted the words "receipt or observation of" prior to "*written* notice" in the sentence preceding the (deleted) quotation from *Scott-Harris*. This change will avoid misunderstandings by making the language of the Note more consistent with the language of the rule.

A member moved that the amendments to Rule 4(a)(6) and the revised version of the Committee Note be approved, with the two changes agreed to by the Committee. The motion was seconded. The motion carried (unanimously).

B. Item No. 00-11 (FRAP 35(a) — disqualified judges/en banc rehearing)

The Reporter introduced the following proposed amendment and Committee Note:

Rule 35. En Banc Determination

(a) When Hearing or Rehearing En Banc May Be Ordered. A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

* * * * *

Committee Note

Subdivision (a). Two national standards — 28 U.S.C. § 46(c) and Rule 35(a) — provide that a hearing or rehearing en banc may be ordered by "a majority of the circuit judges who are in regular active service." Although these standards apply to all of the courts of appeals, the circuits are deeply divided over the interpretation of this language when one or more active judges are disqualified.

The Supreme Court has never addressed this issue. In *Shenker v. Baltimore & Ohio R.R. Co.*, 374 U.S. 1 (1963), the Court rejected a petitioner's claim that his rights under § 46(c) had been violated when the Third Circuit refused to rehear his case en banc. The Third Circuit had eight active judges at the time; four voted in favor of rehearing the case, two against, and two abstained. No judge was disqualified. The Supreme Court ruled against the petitioner, holding, in essence, that § 46(c) did not provide a cause of action, but instead simply gave litigants "the right to know the administrative machinery that will be followed and the right to suggest that the *en banc* procedure be set in motion in his case." *Id.* at 5. *Shenker* did stress that a court of appeals has broad discretion in establishing internal procedures to handle requests for rehearings — or, as *Shenker* put it, "'to devise its own administrative machinery to provide the *means* whereby a majority may order such a hearing.'" *Id.* (quoting *Western Pac. R.R. Corp. v. Western Pacific R.R. Co.*, 345 U.S. 247, 250 (1953) (emphasis added)).

But *Shenker* did not address what is meant by "a majority" in §46(c) (or Rule 35(a), which did not yet exist) — and *Shenker* certainly did not suggest that the phrase should have different meanings in different circuits.

In interpreting that phrase, a majority of the courts of appeals follow the "absolute majority" approach. Marie Leary, Defining the "Majority" Vote Requirement in Federal Rule of Appellate Procedure 35(a) for Rehearings En Banc in the United States Courts of Appeals 8 tbl.1 (Federal Judicial Center 2002). Under this approach, disqualified judges are counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a circuit with 12 active judges, 7 must vote to hear a case en banc. If 5 of the 12 active judges are disqualified, all 7 non-disqualified judges must vote to hear the case en banc. The votes of 6 of the 7 non-disqualified judges are not enough, as 6 is not a majority of 12.

A substantial minority of the courts of appeals follow the "case majority" approach. *Id.* Under this approach, disqualified judges are not counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a case in which 5 of a circuit's 12 active judges are disqualified, only 4 judges (a majority of the 7 non-disqualified judges) must vote to hear a case en banc. (The Third Circuit alone qualifies the case majority approach by providing that a case cannot be heard en banc unless a majority of all active judges — disqualified and non-disqualified — are eligible to participate in the case.)

Rule 35(a) has been amended to adopt the case majority approach as a uniform national interpretation of the phrase "a majority of the circuit judges . . . who are in regular active service" in § 46(c). The federal rules of practice and procedure exist to "maintain consistency," which Congress has equated with "promot[ing] the interest of justice." 28 U.S.C. § 2073(b). The courts of appeals should not follow two inconsistent approaches in deciding whether sufficient votes exist to hear a case en banc, especially when there is a governing statute and governing rule that apply to all circuits and that use identical terms, and especially when there is nothing about the local conditions of each circuit that justifies conflicting approaches.

Both the absolute majority approach and the case majority approach can be defended as reasonable interpretations of § 46(c), but the absolute majority approach has at least two major disadvantages. First, under the absolute majority approach, a disqualified judge is, as a practical matter, counted as voting against hearing a case en banc. To the extent possible, the disqualification of a judge should not result in the equivalent of a vote for or against hearing a case en banc. Second, the absolute majority approach can leave the en banc court helpless to overturn a panel decision with which almost all of the circuit's active judges disagree. For example, in a case in which 5 of a circuit's 12 active judges are disqualified, the case cannot be heard en banc even if 6 of the 7 non-disqualified

judges strongly disagree with the panel opinion. This permits one active judge — perhaps sitting on a panel with a visiting judge — effectively to control circuit precedent, even over the objection of all of his or her colleagues. *See Gulf Power Co. v. FCC*, 226 F.3d 1220, 1222-23 (11th Cir. 2000) (Carnes, J., dissenting from denial of rehearing en banc), *rev'd sub nom. National Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002). For these reasons, Rule 35(a) has been amended to adopt the case majority approach.

Judge Alito reminded the Committee that, at its April 2002 meeting, the Committee decided to move forward on the suggestion of Judge Edward E. Carnes that Rule 35(a) be amended to resolve the three-way circuit split over the treatment of disqualified judges in determining whether "a majority of the circuit judges who are in regular active service" have ordered an en banc hearing under 28 U.S.C. § 46(c) and Rule 35(a). Specifically, the Committee tentatively decided to amend Rule 35(a) to impose the "qualified case majority" approach upon all of the circuits.

At its November 2002 meeting, the Committee changed course and decided, by a 5-3 vote (with one abstention), to amend Rule 35(a) to impose the "case majority" approach. The draft amendment and Note now presented by the Reporter would implement that decision.

Committee members expressed satisfaction with the amendment and Note, except that one member said that she still believes that the "absolute majority" approach is much more defensible as an interpretation of § 46(c) than the "case majority" approach. Other Committee members responded that, in their view, both were reasonable interpretations.

One member suggested that the Note be amended so that, in the first sentence of the last paragraph, the words "can be defended as reasonable interpretations" be replaced by the words "are reasonable interpretations." By consensus, the Committee agreed to the change.

The Committee discussed at some length the conflicting practices of the circuits regarding the amount of information that is disclosed about votes to deny petitions for hearing or rehearing en banc. (Understandably, no circuit discloses any information about votes to *grant* rehearing petitions.) Practices appear to range from, at the one extreme, disclosing nothing except that the petition was denied to, at the other extreme, identifying which judges voted in favor of rehearing, which voted against, which abstained, and which were disqualified. One member said that Judge A. Wallace Tashima, a member of the Standing Committee, had suggested that the Appellate Rules be amended to require courts to disclose the votes of individual judges when rehearing petitions are denied. By consensus, the Committee agreed to put Judge Tashima's suggestion on the study agenda.

Following further discussion, a member moved that the amendment to Rule 35(a) and accompanying Committee Note be approved, with the one change to the Note agreed to by the Committee. The motion was seconded. The motion carried (unanimously).

C. Item No. 01-01 (citation of non-precedential decisions)

The Reporter introduced the following proposed amendment and Committee Note:

Rule 32.1. Citation of Judicial Dispositions

(a) **Citation Permitted.** No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like, unless that prohibition or restriction is generally imposed upon the citation of all sources.

(b) **Copies Required.** A party who cites a judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database must file and serve a copy of that opinion, order, judgment, or other written disposition with the brief or other paper in which it is cited.

Committee Note

Rule 32.1 is a new rule addressing the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like. This Note will refer to these dispositions collectively as "unpublished" opinions. This is a term of art that, while not always literally true (as many "unpublished" opinions are in fact published), is commonly understood to refer to the entire group of judicial dispositions addressed by Rule 32.1.

The citation of "unpublished" opinions is an important issue. The thirteen courts of appeals have cumulatively issued tens of thousands of "unpublished" opinions, and about 80% of the opinions issued by the courts of appeals in recent years have been designated as "unpublished." Administrative Office of the United States Courts, Judicial Business of the United States Courts 2001, tbl. S-3 (2001). Although the courts of appeals differ somewhat in their treatment of

"unpublished" opinions, most agree that an "unpublished" opinion of a circuit does not bind panels of that circuit or district courts within that circuit (or any other court).

State courts have also issued countless "unpublished" opinions in recent years. And, again, although state courts differ in their treatment of "unpublished" opinions, they generally agree that "unpublished" opinions do not establish precedent that is binding upon the courts of the state (or any other court).

Rule 32.1 is extremely limited. It takes no position on whether refusing to treat an "unpublished" opinion as binding precedent is constitutional. *See Symbol Technologies, Inc. v. Lemelson Med., Educ. & Research Found.*, 277 F.3d 1361, 1366-68 (Fed. Cir. 2002); *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260 (5th Cir. 2001) (Smith, J., dissenting from denial of reh'g en banc); *Hart v. Massanari*, 266 F.3d 1155, 1159-80 (9th Cir. 2001); *Anastasoff v. United States*, 223 F.3d 898, 899-905, *vacated as moot on reh'g en banc* 235 F.3d 1054 (8th Cir. 2000). It does not require any court to issue an "unpublished" opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as "unpublished" or specify the procedure that a court must follow in making that decision. It says nothing about what effect a court must give to one of its "unpublished" opinions or to the "unpublished" opinions of another court. The one and only issue addressed by Rule 32.1 is the *citation* of judicial dispositions that have been *designated* as "unpublished" or "non-precedential" by a federal or state court — whether or not those dispositions have been published in some way or are precedential in some sense.

Subdivision (a). Every court of appeals has allowed "unpublished" opinions to be cited in some circumstances, such as to support a claim of claim preclusion, issue preclusion, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees. Not all of the circuits have specifically mentioned all of these claims in their local rules, but it does not appear that any circuit has ever sanctioned an attorney for citing an "unpublished" opinion under these circumstances.

By contrast, the circuits have differed dramatically with respect to the restrictions that they have placed upon the citation of "unpublished" opinions for their persuasive value. An opinion cited for its "persuasive value" is cited not because it is binding on the court or because it is relevant under a doctrine such as claim preclusion. Rather, it is cited because the party hopes that it will influence the court as, say, a law review article might — that is, simply by virtue of the thoroughness of its research or the persuasiveness of its reasoning.

Some circuits have freely permitted the citation of "unpublished" opinions for their persuasive value, some circuits have disfavored such citation but permitted it in limited circumstances, and some circuits have not permitted such

citation under any circumstances. These conflicting rules have created a hardship for practitioners, especially those who practice in more than one circuit. Rule 32.1(a) is intended to replace these conflicting practices with one uniform rule.

Under Rule 32.1(a), a court of appeals may not prohibit a party from citing an "unpublished" opinion for its persuasive value or for any other reason. In addition, under Rule 32.1(a), a court of appeals may not place any restriction upon the citation of "unpublished" opinions, unless that restriction is generally imposed upon the citation of published opinions and all other sources.

It is difficult to justify prohibiting or restricting the citation of "unpublished" opinions. Parties have long been able to cite in the courts of appeals an infinite variety of sources solely for their persuasive value. These sources include the opinions of federal district courts, state courts, and foreign jurisdictions, law review articles, treatises, newspaper columns, Shakespearian sonnets, and advertising jingles. No court of appeals places any restriction on the citation of these sources (other than restrictions that apply generally to all citations, such as requirements relating to type styles). Parties are free to cite them for their persuasive value, and judges are free to decide whether or not to be persuaded.

There is no compelling reason to treat "unpublished" opinions differently. It is difficult to justify a system under which the "unpublished" opinions of the D.C. Circuit can be cited to the Seventh Circuit, but the "unpublished" opinions of the Seventh Circuit cannot be cited to the Seventh Circuit. D.C. Cir. R. 28(c)(1)(B); 7th Cir. R. 53(b)(2)(iv) & (e). And, more broadly, it is difficult to justify a system that permits parties to bring to a court's attention virtually every written or spoken word in existence *except* those contained in the court's own "unpublished" opinions.

Some have argued that permitting citation of "unpublished" opinions would lead judges to spend more time on them, defeating their purpose. This argument would have great force if Rule 32.1(a) required a court of appeals to treat all of its opinions as precedent that binds all panels of the court and all district courts within the circuit. The process of drafting a precedential opinion is much more time consuming than the process of drafting an opinion that serves only to provide the parties with a basic explanation of the reasons for the decision. As noted, however, Rule 32.1(a) does not require a court of appeals to treat its "unpublished" opinions as binding precedent. Nor does the rule require a court of appeals to increase the length or formality of any "unpublished" opinions that it issues.

It should also be noted, in response to the concern that permitting citation of "unpublished" opinions will increase the time that judges devote to writing them, that "unpublished" opinions are already widely available to the public, and

in two years every court of appeals will be required by law to post all of its decisions — including "unpublished" decisions — on its website. *See* E-Government Act of 2002, Pub. L. 107-347, § 205(a)(5), 116 Stat. 2899, 2913-15. Moreover, "unpublished" opinions are often discussed in the media and not infrequently reviewed by the United States Supreme Court. *See, e.g.*, *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 122 S. Ct. 1889 (2002) (reversing "unpublished" decision of Federal Circuit); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (reversing "unpublished" decision of Second Circuit). If this widespread scrutiny does not deprive courts of the benefits of "unpublished" opinions, it is difficult to believe that permitting a court's "unpublished" opinions to be cited to the court itself will have that effect. The majority of the courts of appeals already permit their own "unpublished" opinions to be cited for their persuasive value, and "the sky has not fallen in those circuits." Stephen R. Barnett, *From* Anastasoff *to* Hart *to West's* Federal Appendix: *The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 20 (2002).

In the past, some have also argued that, without no-citation rules, large institutional litigants (such as the Department of Justice) who can afford to collect and organize "unpublished" opinions would have an unfair advantage. Whatever force this argument may once have had, that force has been greatly diminished by the widespread availability of "unpublished" opinions on Westlaw and Lexis, on free Internet sites, and now in the Federal Appendix. In almost all of the circuits, "unpublished" opinions are as readily available as published opinions. Barring citation to "unpublished" opinions is no longer necessary to level the playing field.

Unlike many of the local rules of the courts of appeals, Rule 32.1(a) does not provide that citing "unpublished" opinions is "disfavored" or limited to particular circumstances (such as when no published opinion adequately addresses an issue). Again, it is difficult to understand why "unpublished" opinions should be subject to restrictions that do not apply to other sources. Moreover, given that citing an "unpublished" opinion is usually tantamount to admitting that no published opinion supports a contention, parties already have an incentive not to cite "unpublished" opinions. Not surprisingly, those courts that have liberally permitted the citation of "unpublished" opinions have not been overwhelmed with such citations. Finally, restricting the citation of "unpublished" opinions may spawn satellite litigation over whether a party's citation of a particular "unpublished" opinion was appropriate. This satellite litigation would serve little purpose, other than further to burden the already overburdened courts of appeals.

Rule 32.1(a) will further the administration of justice by expanding the sources of insight and information that can be brought to the attention of judges and making the entire process more transparent to attorneys, parties, and the general public. At the same time, Rule 32.1(a) will relieve attorneys of several hardships. Attorneys will no longer have to pick through the conflicting no-

citation rules of the circuits in which they practice, nor worry about being sanctioned or accused of unethical conduct for improperly citing an "unpublished" opinion. *See Hart*, 266 F.3d at 1159 (attorney ordered to show cause why he should not be disciplined for violating no-citation rule); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-386R (1995) ("It is ethically improper for a lawyer to cite to a court an 'unpublished' opinion of that court or of another court where the forum court has a specific rule prohibiting any reference in briefs to ['unpublished' opinions]."). In addition, attorneys will no longer be barred from bringing to the court's attention information that might help their client's cause; whether or not this violates the First Amendment (as some have argued), it is a regrettable position in which to put attorneys. Finally, game-playing should be reduced, as attorneys who in the past might have been tempted to find a way to hint to a court that it has addressed an issue in an "unpublished" opinion can now directly bring that "unpublished" opinion to the court's attention, and the court can do whatever it wishes with that opinion.

Subdivision (b). Under Rule 32.1(b), a party who cites an "unpublished" opinion must provide a copy of that opinion to the court and to the other parties, unless the "unpublished" opinion is available in a publicly accessible electronic database — such as in Westlaw or on a court's website. A party who is required under Rule 32.1(b) to provide a copy of an "unpublished" opinion must serve and file the copy with the brief or other paper in which the opinion is cited.

It should be noted that, under Rule 32.1(a), a court of appeals may not require parties to file or serve copies of *all* of the "unpublished" opinions cited in their briefs or other papers (unless the court generally requires parties to file or serve copies of *all* sources that they cite). "Unpublished" opinions are widely available on free websites (such as those maintained by federal and state courts), on commercial websites (such as those maintained by Westlaw and Lexis), and even in published compilations (such as the Federal Appendix). Given the widespread availability of "unpublished" opinions, parties should be required to file and serve copies of such opinions only in the circumstances described in Rule 32.1(b).

The Reporter said that he had taken "Alternative B" of the three alternative drafts of new Rule 32.1 presented to the Committee at the November 2002 meeting and made the following changes (among others) to address concerns raised by Committee members:

1. Rule 32.1 has been divided into two subdivisions. Subdivision (a) permits the citation of unpublished opinions, and subdivision (b) requires parties who cite unpublished opinions to provide copies of those opinions if they are not available online.

2. Rule 32.1 is written passively ("No prohibition or restriction may be imposed") rather than actively ("A court must not impose"). Some Committee members thought that this was less

confrontational and thus less likely to raise the hackles of judges. This change is not likely to be popular with the Style Subcommittee, though.

3. Rather than state affirmatively that "any opinion may be cited," Rule 32.1 instead forbids courts from placing prohibitions or restrictions on the citation of unpublished opinions. The Committee has been concerned that courts hostile to the citation of unpublished opinions might undermine an affirmative rule by placing various conditions or restrictions upon the citation of unpublished opinions, while claiming that they still permit such opinions to be cited.

4. Rule 32.1 refers broadly to the citation of "judicial opinions, orders, judgments, or other written dispositions." The Committee has been concerned that, if a narrower phrase such as "judicial opinions" is used, courts hostile to the citation of unpublished opinions might argue that they do not issue "opinions," but "orders" or "mem. disps."

5. Rule 32.1 refers broadly to the citation of opinions "that have been designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent,' or the like." Again, this is an attempt to capture the entire universe of what are commonly referred to as "unpublished" opinions so as to prevent hostile courts from evading the rule.

6. The Note abandons "non-precedential" as the shorthand way of referring to the judicial dispositions that are the subject of Rule 32.1 and substitutes in its place "unpublished." This reflects common parlance, and it further distances Rule 32.1 from battles over whether and to what extent these dispositions are precedential.

7. Language has been added to the Note to more clearly communicate that Rule 32.1 is meant to encompass the unpublished opinions of state courts, as well as those of federal courts.

The Committee's discussion of draft Rule 32.1 focused on three issues:

1. A member asked whether the expression "not available in a publicly accessible electronic database" in subdivision (b) would be understood to refer to an opinion that was available on Westlaw or Lexis but no where else. Are Westlaw and Lexis "publicly accessible," given that one has to pay a fee to use them? The Reporter said that he thought so — just as, say, a movie playing at a local theater would be considered "publicly accessible," even though one must buy a ticket to see it. Other members concurred and pointed out that the Note was clear on the point. Members also mentioned that, under the E-Government Act of 2002, all of the courts of appeals will soon be required to make all of their opinions — published and unpublished — available on their websites.

2. A member pointed out the difference between the language at the end of subdivision (a) — "unless that prohibition or restriction is generally imposed upon the citation of all sources" — and the language at the end of the fourth paragraph of the Note to subdivision (a) — "unless that restriction is generally imposed upon the citation of published opinions and all other sources." The member expressed concern that the inclusion of the reference to "published opinions" in the Note might confuse readers, who might conclude that the Note was meant to

communicate something different from the rule. By consensus, the Committee agreed to delete the words "published opinions and" from the last sentence of the fourth paragraph of the Note to subdivision (a).

3. A member expressed concern about using the expression "generally imposed upon the citation of all sources" in *either* the rule *or* the Note. The member said that courts should be free to impose restrictions on the citation of all *judicial opinions* — published or unpublished — even if those restrictions were not also imposed upon the citation of *all* sources. For example, a local rule requiring parties to identify the author of any judicial opinion cited in a brief should not be objectionable, as long as it is applied to both published and unpublished opinions. But such a rule would be barred by subdivision (a) as currently drafted, because such a rule would place upon the citation of unpublished opinions a restriction that is not "generally imposed upon the citation of *all* sources" — including, for example, statutes or regulations.

All members agreed that subdivision (a) should be modified to provide, in essence, that no restriction can be imposed upon the citation of unpublished judicial opinions unless that restriction is also imposed upon the citation of published judicial opinions. After members struggled to find a concise and elegant way to amend the rule to express that sentiment, a member moved that subdivision (a) be amended by replacing the phrase "unless that prohibition or restriction is generally imposed upon the citation of all sources" with the phrase "unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions." The motion was seconded. Several members spoke in support of the motion, arguing that, while the motion would lengthen the rule and make it somewhat ungainly, it would also express the Committee's intention precisely and clearly. The motion carried (unanimously).

Following further discussion, a member moved that new Rule 32.1 and the accompanying Committee Note be approved, with the one change to subdivision (a) agreed to by the Committee. The motion was seconded. The motion carried (7-1, with one abstention). By consensus, the Committee authorized Judge Alito and the Reporter to make any changes in the Note that they deemed appropriate in light of the amendment to subdivision (a).

V. Discussion Items

A. Item No. 00-07 (FRAP 4 — time for Hyde Amendment appeals)
B. Item No. 02-08 (FRAP 10, 11 & 30 — transmitting records and filing appendices)
C. Item No. 02-16 (FRAP 28 — contents of briefs)
D. Item No. 02-17 (FRAP 32 — contents of covers of briefs)

The Committee is awaiting proposals or revised proposals from the Justice Department with respect to Item Nos. 00-07, 02-08, 02-16, and 02-17. Mr. Letter brought the Committee up to date with respect to the Department's deliberations about these proposals, describing at length the complications that the Department is attempting to address. Mr. Letter said that the

Department hopes to present proposals or revised proposals with respect to these items at the November 2003 meeting of the Committee.

The Committee took a 15-minute break.

E. Items Awaiting Initial Discussion

1. Item No. 03-01 (FRAP 4(a)(4)(A)(vi) — clarify whether includes Rule 60(a) motions)

Judge Jon O. Newman of the Second Circuit wrote a letter to Judge Alito calling the attention of the Committee to *Dudley v. Penn-America Ins. Co.*, 313 F.3d 662 (2d Cir. 2002), in which two judges disagreed over the meaning of Rule 4(a)(4)(A)(vi). That rule tolls the time to appeal if a party files a motion "for relief under [Civil] Rule 60 if the motion is filed no later than 10 days after the judgment is entered." In *Dudley*, Judge Rosemary S. Pooler, writing for the majority, read Rule 4(a)(4)(A)(vi) to encompass both motions under Rule 60(a) and motions under Rule 60(b). Judge Sonia Sotomayor, in a concurrence, argued that Rule 4(a)(4)(A)(vi) should be read to encompass only motions filed under Rule 60(b).

After discussion, the Committee determined by consensus that no amendment to Rule 4(a)(4)(A)(vi) was necessary and that Item No. 03-01 should be removed from the study agenda. Members of the Committee agreed with Judge Pooler that the rule is clear on its face and encompasses both Rule 60(a) motions and Rule 60(b) motions. Moreover, the Committee did not want to amend Rule 4(a)(4)(A)(vi) in a way that would make it necessary for judges to identify whether a post-trial motion was filed under Rule 60(a) or instead under Rule 60(b). Post-trial motions are often labeled wrongly — or not labeled at all — and thus it is often not clear whether a motion is brought under Rule 59, Rule 60(a), or Rule 60(b). After amending Rule 4(a)(4) in 1993 to make it unnecessary to distinguish between Rule 59 and Rule 60 motions, the Committee does not want to amend Rule 4(a)(4) to make it necessary to distinguish between Rule 60(a) and Rule 60(b) motions.

2. Item No. 03-02 (FRAP 7 — clarify whether limited to only FRAP 39 costs)

The Reporter called the attention of the Committee to *Pedraza v. United Guaranty Corp.*, 313 F.3d 1323 (11th Cir. 2002), in which the Eleventh Circuit described a circuit split over the meaning of Rule 7. Under Rule 7, a district court may require an appellant to post a bond "to ensure payment of costs on appeal." The circuits disagree about whether the reference to "costs on appeal" in Rule 7 is limited to those costs identified in Rule 39(e). The D.C. and Third Circuits have held that the phrase is so limited, but the Second and Eleventh Circuits disagree. According to the Second and Eleventh Circuits, the phrase "costs on appeal" in Rule 7 encompasses attorneys' fees that are defined as "costs" under a fee-shifting statute.

The Committee discussed this issue at some length and reached two conclusions:

First, Rule 7 should be amended to resolve the circuit split. This issue is important, and appellants in the Second and Eleventh Circuits — who might be required to post a bond to secure costs and attorneys' fees amounting to hundreds of thousands of dollars — are treated much differently than similarly situated appellants in the D.C. and Third Circuits — who cannot be required to post a bond to secure anything more than a few hundred dollars in costs.

Second, the amendment to Rule 7 should make it clear that district courts can require appellants to post bonds to secure only what are typically thought of as "costs" (such as the costs identified in Rule 39(e)) and not attorneys' fees — whether or not those attorneys' fees are defined as "costs" in the relevant fee-shifting statute. Adopting the position of the Second and Eleventh Circuits would expand Rule 7 beyond its intended scope and vastly increase the cost of Rule 7 bonds. It would also attach significant consequences to whether a particular fee-shifting statute defines attorneys' fees as "costs," a matter that likely reflects little conscious thought on the part of Congress. In addition, district courts would confront practical problems in trying to determine the size of bond necessary to secure attorneys' fees that will be incurred for an appeal in its infancy. Finally, requiring appellants to post a bond to secure attorneys' fees is almost always unnecessary. In most cases in which an appellant might be held liable under a fee-shifting statute for the attorneys' fees incurred by an appellee, the appellant will be a public entity or other organization with ample resources to pay the fees.

The Committee discussed how Rule 7 might be amended to reflect this decision. It quickly became apparent that the drafting will be complicated by the fact that nowhere in the Appellate Rules or in the U.S. Code is there a comprehensive list of costs that are recoverable on appeal. For example, 28 U.S.C. § 1920 identifies costs that are not mentioned in Rule 39, and Rule 39 identifies costs that are not mentioned in § 1920. The Reporter agreed to research this matter further and present a draft amendment and Committee Note at a future meeting.

3. Item No. 03-03 (FRAP 11 & 12 — forbid returning exhibits to parties)

Judge John M. Roll, a member of the Criminal Rules Committee, has called the attention of the Committee to the fact that it is the practice of many district courts to return trial exhibits to the parties while their case is pending on appeal. Judge Roll has two concerns: (1) He is concerned about the ability of appellate courts to quickly retrieve exhibits from parties. (2) More importantly, he is concerned about the integrity of the exhibits — that is, about the possibility that exhibits will be destroyed, misplaced, or altered by the parties while the case is on appeal.

Members of the Committee agreed that this is an important issue, but expressed at least two concerns about any rule that would require clerks to maintain possession of all trial exhibits. First, many clerks simply do not have space to store exhibits. Second, many exhibits — such as guns or drugs — are dangerous, and clerks understandably do not want to take responsibility for securing them.

At the request of the Committee, Mr. Letter agreed that the Justice Department would study this issue and make a recommendation at a future meeting.

4. Item No. 03-04 (FRAP 44 — differences with proposed Civil Rule 5.1)

Under Rule 44(a), a party who challenges the constitutionality of a federal statute in a case in which the federal government is not a party is required to notify the clerk of the challenge, and the clerk is then required to notify the Attorney General. Rule 44(b) — added in 2002 — applies a similar notice requirement to challenges to the constitutionality of state statutes in cases in which state governments are not parties. Rule 44 is derived from 28 U.S.C. § 2403.

Civil Rule 24(c) contains provisions similar to those found in Appellate Rule 44. However, the provisions of Civil Rule 24(c) have largely escaped the notice of district judges and trial attorneys, most likely because they are buried in a rule regarding intervention. As a result, the federal government often has not received timely notice — or, indeed, *any* notice — of constitutional challenges to federal statutes.

The Civil Rules Committee proposes to remedy this problem by adopting a new Civil Rule 5.1. That rule — which has not yet been approved for publication by the Standing Committee — would differ in several respects from current Appellate Rule 44. Most significantly, Civil Rule 5.1 would require the clerk to notify the government of a constitutional challenge when the party raising the challenge fails to do so (or when the court itself questions the constitutionality of a statute). Under Appellate Rule 44, the clerk is obligated to notify the government only after a party has notified the clerk of the existence of a constitutional challenge. Given that proposed Civil Rule 5.1 and existing Appellate Rule 44 are derived from the same statute and address the same subject matter, the Standing Committee is likely to insist that the rules be reconciled or that the differences be justified by the differences between trial proceedings and appellate proceedings.

Mr. Letter said that current Civil Rule 24(c) is not effective and needs to be changed so that the government receives timely notice of constitutional challenges to federal statutes. Although members of the Committee did not dispute that point, they did raise some practical questions about proposed Civil Rule 5.1. For example, how are clerks supposed to "screen" cases for constitutional challenges? Clerks cannot possibly read every paper filed in every case — much less follow every oral argument made before a court. How are clerks supposed to know when the constitutionality of a statute has been challenged? Moreover, does the government really want to be notified of each and every constitutional challenge — including the many hundreds of frivolous challenges made by prisoners, tax protesters, and pro se litigants? Is it not possible that serious challenges would get lost in the blizzard of paperwork created by the many frivolous challenges?

Mr. Letter acknowledged that these were valid questions and asked the Committee to give him an opportunity to consult with his colleagues at the Department of Justice and report back with a recommendation regarding Rule 44. By consensus, the Committee agreed to maintain Item No. 03-04 on its study agenda.

5. Item No. 03-05 (require written opinions in every case)

Prof. Joseph R. Weeks of the Oklahoma City University School of Law has proposed a new Appellate Rule 49 that would require courts to "issue a written opinion explaining the basis for each disposition." In other words, every decision by a court of appeals would have to be explained in a written opinion. Under Prof. Weeks's proposal, every opinion would have to "expound on the law as applied to the facts of the case and set out the basis for the disposition."

Several members of the Committee expressed appreciation for Prof. Weeks's proposal and agreement with many of the points that he made in his letter. No one on the Committee disagrees that, for many reasons, it is important for courts to explain their decisions. All members of the Committee agree that, in an ideal world, every decision of every court would be accompanied by a meaningful opinion. However, the Committee also agreed by consensus not to pursue Prof. Weeks's proposal. Among the Committee's concerns are the following:

1. Any rule that would require courts to explain every decision in a written opinion would have little chance of being approved by the Standing Committee and no chance of being approved by the Judicial Conference.

2. The Committee is already engaged in a difficult effort to amend the Appellate Rules to require courts to permit the citation of unpublished opinions. Members of the Committee have assured wary judges that proposed Rule 32.1 is not the first step on a slippery slope that will end with all courts being required to issue "precedential" opinions in all cases. Prof. Weeks's proposal would be seen as the next step on that slippery slope, and if the Committee were to pursue the proposal, the likely reaction from judges might make it more difficult to get approval of Rule 32.1.

3. The workloads of federal appellate judges are enormous. Judges of today are required to decide many more cases than judges of 30 or 40 years ago. Until significantly more judgeships are created and filled, hard decisions will have to be made about the allocation of judicial resources. Prof. Weeks's proposal would essentially force judges to spread their time thinly over all cases rather than choose to devote substantial time to some cases and less time to others. Some members of the Committee view this as poor stewardship of judicial resources. More importantly, all Committee members, regardless of their personal views, agree that this policy decision should not be made in the same way for all judges by this Committee.

4. It would be extremely difficult to draft a rule that would be effective in forcing judges who do not want to do so to issue a satisfactory opinion in every case. Moreover, it would be almost impossible to enforce a "mandatory opinion" rule against judges who tried to evade it.

By consensus, the Committee removed Item No. 03-05 from the study agenda.

6. Item No. 03-06 (FRAP 3 — defining parties)

On behalf of the Solicitor General, Mr. Letter presented a proposal to add a new Rule 3(f). Under that proposed rule, all parties to the case before the district court would be deemed parties to the case on appeal, and all parties to the case on appeal — save those who actually file

a notice of appeal — would be deemed appellees. Parties who had no interest in the outcome of the appeal could withdraw from the case by filing a notice with the clerk. An "appellee" who supported the position of an appellant would have to file its brief within 7 days after the brief of that appellant was due. And an appellee who supported the position of an appellant would not be permitted to file a reply brief. Mr. Letter stressed that proposed Rule 3(f) was drafted to avoid the difficult issue of whether and to what extent a non-party can take advantage of the decision of an appellate court.

One member said that, in prohibiting appellees who support appellants from filing reply briefs, proposed Rule 3(f) departs from the Supreme Court rules on which it is patterned. Respondents who support petitioners are allowed to file reply briefs in the Supreme Court. The member said that he thought that a similar practice should be followed in the courts of appeals.

Another member objected to giving appellees who support appellants 7 more days to file their briefs than appellants themselves. Although she understands the desire to avoid duplication, she pointed out that the effect of the rule is to give de facto appellants who do *not* file notices of appeals more time to file briefs than de jure appellants who *do* file such notices.

Another member questioned the need for proposed Rule 3(f). He pointed out that, under Rule 4(a)(3), if one party files an appeal, all other parties get at least 14 days to file a notice of appeal. Thus, a party who does not want to appeal, but who also wants to participate in the appeal if another party appeals, can simply file its own notice of appeal after the other party "pulls the trigger." The member said that he saw little need for the rule, and he feared that the rule might have unintended and unanticipated consequences.

Finally, Prof. Mooney said that the Committee considered a similar proposal about 10 years ago. She recalls that the Committee gave the proposal considerable attention. She said that she did not have a good memory of the details of the proposal or the reasons for its rejection, but the records of the Committee should illuminate the matter. Mr. Rabiej agreed to research the Committee records.

By consensus, the Committee agreed to maintain Item No. 03-06 on the study agenda. Mr. Letter said that the Justice Department would consider the comments made by Committee members and review any records discovered by Mr. Rabiej.

VI. Additional Old Business and New Business

Judge Stewart and Mr. Svetcov described an issue that had been brought to their attention by Judge Will Garwood of the Fifth Circuit (former chair of the Committee) and Fifth Circuit clerk Charles R. "Fritz" Fulbruge III (former liaison to the Committee from the appellate clerks).

Under Rule 26(a)(2), "legal holidays" are excluded when computing any period of time that is less than 11 days. Moreover, under Rule 26(a)(3), if the last day of a period of time falls on a "legal holiday," that period of time does not end until the following day.

Rule 26(a)(4) defines "legal holiday" to include a list of federal holidays and "any other day declared a holiday by . . . the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office." Thus, in a case involving an appeal to the Fifth Circuit (headquartered in New Orleans) from an order of a district court in Texas, a day that is declared a holiday in *either* Louisiana *or* Texas would be deemed a "legal holiday" for purposes of Rule 26(a).

Mr. Fulbruge has raised the question whether a holiday declared by a particular *county* or *parish* would count as a "legal holiday" under Rule 26(a)(4). The Committee unanimously agreed that it would not, although the fact that a holiday was declared by the county or parish in which the circuit clerk's office was located might make the office "inaccessible" for purposes of Rule 26(a)(3).

Judge Garwood and Mr. Fulbruge also identified the following anomaly: A lawyer who lives in Texas and who represents a party in an appeal from an order of a district court in Texas and who has 10 days to respond to a paper would get an "extra" day under Rule 26(a)(2) if a holiday declared by the State of *Louisiana* falls in the middle of that 10-day period. There is no reason why an attorney who lives and works in Texas — or any other state except Louisiana — should get extra time to file a paper because one of the days within his deadline happens to be a holiday in Louisiana.

Committee members agreed with Judge Garwood's and Mr. Fulbruge's interpretation of the rule. However, Committee members also expressed the view that Rule 26(a) should not be amended to "fix" this anomaly. First, the anomaly does not arise from an ambiguity in the rule; indeed, the anomaly is created by the plain meaning of the rule. Second, the anomaly does not harm anyone. A very clever lawyer might figure out that he has one additional day to file a paper, and a similarly situated lawyer who is not as clever might file his paper one day earlier than was necessary. But no lawyer is going to blow a deadline because of the anomaly. Third, the anomaly cuts both ways in the sense that a lawyer living and working in New York who represents a party in an appeal from an order of a district court in Texas will *not* get to exclude a New York holiday, even though his office may be closed on that day. Finally, amending the rule to "fix" the anomaly would be a complicated undertaking and might very well give rise to additional anomalies — anomalies that might be more harmful than the anomaly identified by Judge Garwood and Mr. Fulbruge.

Judge Alito agreed that he would contact Judge Garwood and Mr. Fulbruge and inform them that, while the Committee would be happy to entertain a specific proposal to amend Rule 26(a), it was not presently inclined to try to fix the anomaly that they had identified.

VII. Schedule Dates and Location of Fall 2003 Meeting

The Committee will meet on November 7, 2003, in San Diego, California. At this point, it appears that only a one-day meeting will be necessary.

VIII. Adjournment

By consensus, the Committee adjourned at 12:00 noon.

Respectfully submitted,

_____

Patrick J. Schiltz
Reporter